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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

SSL LANDLORD, LLC, et al., Plaintiffs and Appellants, v. COUNTY OF SAN MATEO, Defendant and Respondent.	A150878 (San Mateo County Super. Ct. No. CIV532369)

Plaintiffs SSL Landlord, LLC, SSL Tenant, LLC, and Health Care Reit, Inc., owners of Silverado Senior Living Belmont Hills, an assisted living and memory care facility (hereinafter referred to collectively as "Silverado") appeal from an order and judgment entered in an action for refund of real property taxes paid to defendant County of San Mateo (County) (Rev. & Tax. Code, § 5140)[1]. In its complaint, as also alleged in its reassessment appeals before the County Assessment Appeals Board (Board), Silverado challenges the County Assessor's enrollment of the property at an assessed value of $26.4 million. Following a bench trial, the court remanded the matter to the Board for a new determination on Silverado's reassessment appeals.

Silverado has no dispute with the trial court's remand to the Board for a reassessment of the value of the property. Silverado asserts, however, that the order and judgment's directives to be applied by the Board at the new hearing are "materially

[1] All further unspecified statutory references are to the Revenue and Taxation Code.

deficient" because they are contrary to the law, unworkable, and unfair. We disagree and, accordingly, affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Silverado owns and operates a 112-bed assisted living and memory care facility located on 17.14 acres in Belmont (the Belmont property). The improvements, which occupy approximately 46,000 square feet, were built in the mid-1970s and expanded in 1988, and consist of five separate inter-connected structures, all one-story in height, of wood frame construction, "characterized by 'extensive patios, extensive setback areas, extensive gardens, outdoor areas, and extensive parking.' "

In 2011, Silverado purchased the Belmont property as part of a portfolio of assisted living facilities for a total purchase price of $300 million. The transfer was not an arms-length transaction between the buyer and seller, but instead was a transfer between related or affiliated legal entities: Silverado Senior Living Holdings, Inc., was both a seller and buyer in the transactions (as one of the owners of the selling entity and one of the owners of the buying entity), and the business operator, Silverado Senior Living, Inc., was also a buyer (again, as one of the owners of the buying entity).

Silverado filed with the County Assessor (Assessor) a preliminary change in ownership report ("PCOR"), with a stated purchase price of $26.4 million for the real property. Based on an analysis of market data and the financial statements provided by Silverado, the Assessor found the indicated purchase price for the real property was consistent with its fair market value, and, therefore, enrolled the property with the assessed value of $26.4 million.

A. Board Proceeding

Silverado filed administrative appeals with the Board, challenging the enrolled sum of $26.4 million (for the base-year value of the real property as of the lien date of October 14, 2011, and for the next regular assessment lien date of January 1, 2012 (collectively "Lien Dates")), on the ground that the assessed value exceeded the fair market value at the time of the 2011 transfer.

1. Board Hearing

The Board held a valuation hearing over the course of three days, on February 13, 2014, April 24, 2014, and July 17, 2014.

In its opening statement, Silverado took the position that the fair market value of the real property was $16 million based on its expert appraiser's testimony and written "comparable sales approach" and an "income approach" valuations. With respect to the comparable sales approach, the expert appraiser first performed a fee simple land valuation (i.e., property if unimproved) to confirm the property's highest and best use was as currently improved with an institutional facility; this was not disputed by the County. The expert appraiser also presented a comparable sales analysis of the real property with improvements based on comparable sales of improved real property, which indicated a market value of $16.5 million. The expert appraiser's income analysis used rental data for comparable facilities where only the real property and improvements were being leased, and not the facilities. That analysis yielded a market value of $14.23 million. Reconciling the various market values, Silverado argued that $16 million should be the enrolled sum for both Lien Dates.

The County took the position that the $26.4 million sum was proper as the Assessor's income approach analysis independently confirmed the enrolled sum of $26.4 million as the fair market value of the real property. Unlike the income approach used by Silverado's expert appraiser that used comparable rental data, the Assessor's income approach used the actual operating income generated by the facility on the subject property, which data was provided by Silverado. The Assessor "derived a rounded market value of" $26.4 million by calculating a stabilized income for the property, then deducting fixed charges, a base management fee of five percent, and reserves, then applying a capitalization rate of 7.75 percent, and finally deducting an amount for the potential loss of income.

Silverado's primary challenge to the Assessor's use of the income approach was that, by using the facility's actual operating income, the Assessor had performed "a going-concern appraisal" and capitalized the total return of all assets of the property,

including nontaxable intangible assets such as the assembled workforce, the management agreement, and the license to operate the facility. The Assessor replied that in using the facility's actual operating income, he had considered that (1) Silverado had valued all intangible assets at $10 in the transfer documents for the subject property, (2) assumed the presence of intangible assets necessary to put the property to productive use (*Elk Hills Power, LLC* v. *Board of Equalization* (2013) 57 Cal.4th 593, 614 (*Elk Hills Power*)), and (3) actually deducted a sum representing a base management fee of five percent. By his actions, the Assessor opined he had appropriately deducted the value of all nontaxable intangible assets reflected in the facility's income stream.

Between the second and third hearing, our colleagues in Division Five issued their decision in *SHC Half Moon Bay, LLC v. County of San Mateo* (2014) 226 Cal.App.4th 471 (*SHC Half Moon Bay*), which concerned a taxpayer's challenge to the property tax assessment of a hotel, which assessment was made by the same Assessor as in this case. (*Id.* at p. 475.) In *SHC Half Moon Bay*, the taxpayer asserted that the assessed value of the hotel's real property was "erroneously inflated . . . by including $16.85 million in nontaxable intangible assets." (*Ibid*.) In support of its argument, the taxpayer presented credible evidence of quantified values of specified intangible assets of the taxpayer: a golf course agreement, workforce in place, and an employee parking lot. (*Id*. at p. 490.) The Assessor did not dispute those specific intangible assets and agreed that the values of those intangible assets should be deducted from the assessment value. (*Ibid*.) At issue was the parties' dispute of the value to be placed on the intangible asset of "goodwill" associated with the hotel. (*Ibid*..) The court concluded that the Board had properly accepted, as an issue of fact, that the Assessor's deduction of the values of the intangible assets of management fees and franchise fees largely captured a deduction for goodwill, and therefore, no separate deduction for goodwill was required to be applied to the assessment value. (*Id*. at p. 493.) In so concluding, the court found no error in the Board's rejection of the taxpayer's valuation of goodwill at $14.5 million, representing the difference (or residual) between the purchase price and the value of the real property only. (*Id*. at pp. 490, 493.)

Following the issuance of *SHC Half Moon Bay*, and before the third administrative hearing, County counsel had the Assessor prepare a revised income approach analysis, in the form of a spreadsheet exhibit, which included quantified values of the intangible assets (the assembled workforce, the management agreement/incentive management fee, and the license to operate the facility) identified by Silverado during the earlier administrative hearings. The Assessor's quantified values were based upon tax documents Silverado submitted in camera to the County during the administrative hearings, at the County's request. The Assessor specifically informed the Board and Silverado that his revised income approach analysis, which took into consideration his calculation of quantified values of the intangible assets in question, supported a downward adjustment of the assessment value. Silverado's counsel objected to the admission of the Assessor's spreadsheet exhibit and stipulated that Silverado did not intend to produce any expert evidence of the quantified values of the intangible assets, "other than commenting" in closing argument on the element of intangible assets to the extent the Assessor had purportedly accounted for those assets in his original appraisal and earlier testimony. The Board agreed with Silverado that the proffered spreadsheet exhibit, evidencing the Assessor's revised income approach analysis supporting a downward adjustment, would not be admitted into evidence. Thus, as Silverado requested, the Board did not consider the Assessor's revised analysis supporting a downward adjustment to the assessment, and considered only the Assessor's original analysis and Silverado's challenges to that analysis.

2. Board's Decision

The Board issued a 22-page decision. The Board began by noting that the sum of $26.4 million for the Lien Dates was derived from (a) Silverado's PCOR and the Transfer Tax Affidavit, which stated the sum of $26.4 million as the value of the real property, and (b) the Purchase and Sale Agreement for the transfer, which specified that licenses and other intangible assets (as further identified in the Bill of Sale and General Assignment of Intangible Property) were part of the sale and transferred for consideration of $10. At the administrative hearings, however, Silverado had presented evidence and argument that

the sum of $26.4 million reflected the purchase price for " 'an entire business,' not simply the real property." It argued that its agents had mistakenly prepared the transactional documents showing the purchase price of $26.4 million for the real property only when the sum of $16 million should have been reported and enrolled as the value of the real property for the Lien Dates.

The Board accepted the parties' stipulation that, because the transfer was not an arms-length transfer, the purchase price of $26.4 million would not enjoy any presumption that it was the fair market value. Therefore, the Board's decision was based on both parties' expert appraisal evidence, all of which purported to value the real property without reliance on the purchase price or calculations of the total enterprise value. The Board further noted that it applied the general burdens of proof governing a taxpayer's challenge to a property assessment: (1) the assessment made by the Assessor would "enjoy a presumption of correctness;" and (2) Silverado would bear the burden of establishing "by a preponderance of the evidence" that the Assessor's valuation of the subject property was incorrect.

The Board set forth a detailed discussion of each of the valuation methods used by the parties' expert appraisers, including extensive portions of the testimony and documentary evidence, and its reasons for accepting or rejecting the parties' evidence and arguments.

1. Comparable Sales Approach*:* Silverado's expert appraiser prepared a "comparable sales approach" analysis, using five "comparable sales" of assisted living facilities in Walnut Creek, Menlo Park, Concord, San Anselmo, and a portfolio (joint) sale of facilities in Livermore and Beverly Hills.

The Board found the expert appraiser's comparable sales analysis was not helpful for the following reasons: (1) four of the comparable facilities were located outside the San Francisco Peninsula; (2) the expert appraiser placed little reliance on the one comparable facility located on the San Francisco Peninsula, because, as a skilled nursing facility it had a " 'significantly inferior' " economic profile; (3) there was insufficient evidence allowing the Board to conclude the expert appraiser's adjustments to account

for differences in locations were reasonable given "the vastly different locations at issue;" (4) "given the unique characteristics and location of the [subject property], it [was] unclear whether facilities located in entirely distinct and distant communities could generally be used as comparables without some further indication of the similarities of the locations" (see § 402.5 [requiring that comparable sales "be located sufficiently near the [property] . . . to make it clear that the properties sold . . . may fairly be considered as shedding light on the value of the property"]); (5) one of the comparable facilities located outside the San Francisco Peninsula was of limited probative value as to the subject property's value as of the Lien Dates because the comparable sale went into contract in 2008 and sold in 2009; and (6) the expert appraiser had placed the " 'greatest weight' " on the comparable sale in which two facilities had been sold as part of a portfolio sale, but he offered no evidence concerning the sale, he admitted he had little experience with portfolio sales, and he did not know whether an investor might expect a discount when purchasing two properties from the same buyer in one sale. The Board also found that the expert appraiser's comparative sales analysis was faulty because he should have better accounted for the possibility of the expansion of the facility on the subject property, rejecting the appraiser's opinion that expansion was not possible under the City of Belmont's current General Plan.

2. Fee Simple Land Valuation. Silverado's expert appraiser also prepared a fee simple land valuation, again using a "comparable sales approach" to support his conclusion that the subject property, improved with the assisted living facility, was its highest and best use. The comparable sales used in this valuation consisted of "four closed land sales and two land sales that never closed"; each of the selected properties were former or future school sites with corresponding zoning, which the appraiser claimed matched the neighborhood of the subject property, and each of the closed sales was ultimately developed for residential use.

The Board found the expert appraiser's fee simple land valuation unhelpful as it contained "flaws that significantly affect[ed] its reliability." "First, two of the comparable[ ] [sales] . . . did not actually close, and the Board finds that the sales figures

are not indicative of market value. Second, [the expert appraiser's] closed comparable sales span a wide timeframe – 2003, 2005, 2006, and 2011," and no specific adjustments for time were made. Although the expert appraiser opined that time adjustments were not needed because the height of the market was 2006-2007 and values had backed off during a later recessionary period, the comparable sales closed in the years before, during, and after that peak and "thus necessarily occurred under varying market conditions. His failure to make any time adjustment across this wide timespan is thus inconsistent with his own testimony, and without any additional information in the record about market conditions both at the various times of his comparable sales and the [subject property], the Board cannot determine whether [the expert appraiser's] decision not to adjust for time is reasonable."

3. Income Approach. Silverado's expert appraiser also prepared an income approach valuation, using "rental information" from six leases of assisted living facilities with locations in San Francisco, Morgan Hill, San Jose, Hayward, Campbell, and San Rafael. The expert appraiser explained he had used comparable rental properties in an attempt to avoid the inclusion of any enterprise value in valuing the real property. He did not use the actual income generated for the Silverado facility because "he 'didn't have a good way to segment out the management, the services, all of the aspects of the income production at that facility that related to a business enterprise.' "

The Board also found this approach to be of no assistance because "[s]imilar to [the] comparable sales analysis, the reliability of . . . value conclusion depend[ed] chiefly on whether the financial data (here, rental income) of the properties selected as comparable reasonably sheds light on the market rent range for the economic rent of the" subject property. In order to isolate the rental value of the real property, the expert appraiser "selected leases for facilities in six different cities across the Bay Area, none of which is located in San Mateo County." The Board found, among other things, that the expert appraiser had not adequately accounted for differences in location and physical characteristics between the comparables and the subject property, and the fact that the comparable leases had been negotiated over a broad range of time (2004 to 2011). The

Board acknowledged that, unlike in the context of a comparable sales analysis, there was no legal authority expressly requiring that comparable leases used to derive the economic rent of a subject property be specifically adjusted for differences in time, location, and physical characteristics of the comparables. Nonetheless, the Board found the lack of legal authority did not "absolve an appraiser from at least adequately accounting for such differences in the analysis. Indeed [California Code of Regulations, title 18, section 8, subdivision (e)], which governs use of the income approach, specifics that 'recently negotiated rents or royalties of . . . comparable properties should be used in estimating the future income if, in the opinion of the appraiser, they are reasonably indicative of the income the property will produce in its highest and best use under prudent management.' " "While [California Code of Regulations, title 18, section 8, subdivision (e)] does not specifically require adjustments to comparable rental rates, it establishes that the comparable leases must be near in time to the Lien Dates and must concern properties that are sufficiently comparable to the [subject property] such as to illuminate the economic rent of the [subject property]." The Board further noted that while the expert appraiser did not have to make specific, quantitative adjustments for differences in locations, time, physical characteristics, or other conditions, nonetheless the Board had to be able to evaluate whether the expert appraiser had adequately and reasonably accounted for any relevant differences, and based on the record, the Board was unable to do so, and therefore, found the expert appraiser's "value conclusion of $14.23 [million] is unreliable."

4. Cost Approach

The Board also explained its reasons for not considering "a cost approach" for valuing the property. Silverado's expert appraiser had not attempted to value the property using a "cost approach" because of the " 'subjectivity involving in the estimate of depreciation' for properties built in the 1970s." While the Assessor had presented his valuation using a "cost approach" analysis ($2.3 million for the property's improvements and a land value of $23.150 million using four comparable land sales), the Assessor agreed that three of the comparable land sales should be excluded for the base-year

appeal because they occurred more than 90 days after the October 14, 2011 Lien Date. With only one remaining comparable land sale, the Assessor admitted he would not have performed a land valuation estimate. Given the Assessor's admissions, the Board gave no weight to the evidence present to support the Assessor's valuation based on his cost analysis approach. In a footnote in its decision, the Board noted that while the parties advanced arguments regarding whether the zoning of the comparable sales used in the Assessor's cost approach were in accordance with section 402.1, the Board did not address those arguments because it assigned no weight to the Assessor's cost approach.

5. Assessor's Valuation

In contrast to Silverado's valuation evidence, the Board found the Assessor's valuation of the property at $26.4 million to be supported by the record:

"The Assessor presented an income approach valuation based on an entirely different data set than that of [Silverado's expert appraiser]. Rather than declining to use the income data from the [subject property], the Assessor specifically based its income methodology on operating income figures for the [subject property] provided by [Silverado]. . . . After calculating a stabilized income for the [subject property], the Assessor deducted fixed charges, a base management fee of 5%, and reserves. Using a capitalization rate of 7.75% and deducting an amount for the potential loss of income, the Assessor derived a rounded market value of [$26.4 million]." The Board noted Silverado's contention "that, by relying on the operating income of the [subject property], the Assessor has essentially performed a going-concern appraisal and capitalized the total return of all assets on the [subject property], including intangibles such as the workforce, the management agreement, and the license to operate [the facility]." However, in determining whether the Assessor had improperly enhanced the value of the property by including the value of the noted intangibles, the Board found: "The burden is on [Silverado] to set forth a value of any intangible that it contends has been subsumed in the Assessor's valuation. [(See *Elk Hills Power, supra,* 57 Cal.4th at p. 615 ["if the intangible assets are necessary to the beneficial or productive use of the taxable property, the court must determine whether the [taxpayer] plaintiff has put forth credible evidence

that the fair market value of those assets has been improperly subsumed in the valuation"].)] [Silverado] admits that it must present credible evidence that the value of intangible assets is reflected in the Assessor's valuation. . . . [¶] Here, [Silverado] has stipulated that it has not put on any evidence of the value of any intangible other than to comment upon the Assessor's valuation. . . . [Silverado] did not present evidence of the value of any claimed intangibles, such as licenses, workforce in place, or business enterprise. [Silverado's witness] testified that, in some states, there is a market for licenses to operate an assisted living facility such as the [subject property], there is no such market in California, and he was unable to assign any quantifiable value to the license. . . . [Silverado] provided no other evidence of the value of the license to operate. [Indeed, the only other evidence in the record is of the value of any of the intangibles associated with the assisted living facility on the [subject property] is the Purchase and Sale Agreements from the October 14, 2011 transfer, which specified that all intangibles transferred for consideration of $10. . . . Given this stated nominal value, it would be highly inconsistent for [Silverado] to argue for its benefit in the instant proceedings that the actual value is much greater]. Although the license to operate is necessary to the operation of the assisted living facility on the [subject property] . . ., in the absence of any basis for attributing a market value to the license . . ., the Assessor may properly assume the presence of the license without making any deduction to the income stream attributable to this intangible asset. [(*Elk Hills Power*, *supra*, at p. 619 ["Elk Hills has not articulated a basis for attributing to the [intangible asset] . . . any separate stream of income at all. As such, we have no basis for concluding the Board erred in not imputing to the [intangible asset] some independent value that would be deducted from the total income generated by the taxable property"].)]

Moreover, the Board rejected Silverado's argument that it did not have to present any evidence of the quantifiable fair market value of any particular intangible because the Board could find that such intangible assets had a value of "roughly" $10 million, which represented the difference between its expert appraiser's value conclusion of $16 million, which was based on analyses that excluded a value for the business enterprise, and the

Assessor's valuation of $26.4 million based on the income approach. According to Silverado, the $10 million difference "demonstrates that the Assessor's valuation has subsumed the fair market value of intangible assets. . . . As explained above, however, the Board does not find [the expert appraiser's] reconciled value conclusion of [$16 million] to be credible based on the record in this case, and thus [Silverado's] contention that [$10 million] in value of intangible assets has been subsumed in the Assessor's valuation is not consistent with the evidence. In the absence of any other evidence presented by [Silverado] regarding the fair market value of any of the alleged intangibles embedded in the Assessor's valuation, the Board finds that [Silverado] has not met its burden with respect to setting forth credible evidence of the quantifiable fair market value of any identified intangible asset." And, therefore, in the absence of any evidence of the value of any identified intangible asset that was impermissibly subsumed in the assessment value, the Board found the Assessor's methodology had appropriately accounted for the value of the enterprise.

B. Trial Court Proceeding

Following a bench trial, the trial court issued a 17-page statement of decision. The court noted that Silverado bore the burden of proving the assessment value was incorrect at the Board proceeding, and that the Assessor "benefitted from the presumption of the correctness of his assessment." The court also set forth the standard by which it would review a complaint challenging the Board's decision, quoting, from *Elk Hills Power, supra*, 57 Cal.4th at p. 606: "The proper scope of review of assessment decisions is well established. [Citation.] 'When the assessor utilizes an approved valuation method, his factual findings and determinations of value based upon the appropriate assessment method are presumed to be correct and will be sustained if supported by substantial evidence.' [Citation.] However, where the taxpayer attacks the validity of the valuation method itself, the issue becomes a question of law subject to de novo review. [Citations.]"

The trial court then addressed Silverado's contentions that (1) "the Board erred when it utilized the income method to value the Subject Property because . . . the income

stream used [by the Assessor] included the following intangibles: 1) the management agreement/incentive management fee, 2) the assembled workforce, 3) the value of its operating license, and 4) the business enterprise value;" (2) "the Board erred in rejecting [Silverado's] comparable sales/rents analys[e]s and imposed excessive and unlawful comparability requirements on [it]; and (3) "the Board erred in determining that the taxpayer was required to account for the inherent value of the possibility that the property could be further developed." As to Silverado's first contention, regarding the Assessor's use of the income approach method to value the subject property, the court reviewed the issue "de novo and exercise[d] its independent judgment as to the evidence." As to the second and third contentions, regarding the Board's consideration of Silverado's valuation evidence, the trial court reviewed those issues under the substantial evidence standard.

The trial court described in detail its reasons for finding that: (1) the Board did not err as a matter of law in applying the income method to value the subject property; (2) there was substantial evidence in the record supporting the Board's discretionary ruling rejecting Silverado's valuation evidence on the sole ground that the "comparable properties" used for the analyses were not comparable; and (3) the Board's further rejection of Silverado's "comparable properties" evidence on the ground the expert appraiser had failed to account for the inherent value in the possibility of the development of the subject property, was harmless error.

The trial court found, in pertinent part, that in applying the income approach to value the subject property, the Board had the option of using either the actual operating income of the facility on the subject property (the Assessor's method) or using comparable rents of other properties (the method used by the Silverado's expert appraiser). According to Silverado, the use of comparable rents of other properties "assures that no intangible value is included in the assessment" value. However, because Silverado's expert appraiser's "comparable" rental properties were not comparable, the court found the Board had appropriately used the actual operating income of the facility on the subject property. Nonetheless, the trial court agreed with Silverado that the

Board's use of the actual operating income of the facility on the subject property did not make "all necessary deductions" to remove the value of intangible assets Silverado claimed had been impermissibly subsumed in the assessment value.

In ordering a remand for a new determination, the trial court explicitly stated that the Board could exercise its discretion by giving Silverado a second opportunity to present additional data of comparable rents of other properties and apply the income approach used by its expert appraiser. However, if the Board again decided to apply the Assessor's income approach and rely on the actual operating income from the facility on the subject property, then the Board was directed to value and remove any intangible assets that Silverado claimed were impermissibly subsumed in the assessment value.

The trial court offered the following guidance and observations if the Board chose to identify and value intangible assets in applying the Assessor's income method approach to valuation.

(1) The Board was to determine, as a question of fact, whether the Assessor's deduction of the base management fee of five percent was sufficient to exclude the intangible business value of the taxpayer under the guidance of *SHC Half Moon Bay, supra,* 226 Cal.App.4th at pages 492–493. In so finding, the trial court found that unlike the situation in *SHC Half Moon Bay,* in which the taxpayer there had presented credible evidence quantitatively valuing the intangible asset of good will at $14.15 million (*Id*. at p. 493), in this case Silverado had failed to present any valuation evidence and it specifically declined to do so while objecting to the Assessor's attempt to provide additional valuation evidence of the intangibles. Consequently, the court found the Board's lack of detailed finding on this issue was "akin to invited error by" Silverado. [(*Norgart v. Upjohn Co*. (1999) 21 Cal.4th 383, 403 [('[t]he "doctrine of invited error" is an "application of the estoppel principle": "[w]here a party by his conduct induces the commission of error, he is estopped from asserting it as a ground for reversal" on appeal[ ]'].)] The court further noted that the "Board's determination that, in the absence of any evidence from [Silverado] to the contrary, the Assessor's deduction of the management fee removed any value attributable to business enterprise is consistent with the holding in

[*SHC Half Moon Bay*] . . . ." Nonetheless, the court believed that the Board "should better articulate why the removal of the management fee from the income stream removes the intangible asset of business value. It is possible, like in [*SHC Half Moon Bay*] the Board may deduce from the testimony and documents in the record that the business value accrues largely to the management company which would support a finding that the business value is removed by the deduction of the management fee."

(2) The Board had the discretion to determine the quantitative value of the intangible assets, and need not take further evidence of their value, based solely on the agreements for the purchase of the subject property that had been admitted into evidence during the administrative hearings. In so commenting, the trial court noted the transfer agreements in question had valued the licenses and other intangible assets at the sum of $10, and that during the hearings, Silverado had not presented any evidence repudiating those agreements or made any claims that the agreements were not accurate. The court further noted that at the bench trial, Silverado had argued that the Bill of Sale had set a nominal value for intangible assets such as the licenses for other accounting purposes and the document did not represent the actual value of such intangibles. However, the court found there was no evidence in the record to support Silverado's contention and the Assessor had attempted to adduce the value of a variety of intangible assets and received no assistance from the taxpayer.

(3) The Board was directed to develop the record to determine whether the value of the assembled work force in the facility on the subject property was transferred as part of the purchase transaction, and if so transferred, the Board was then to determine whether the value of that assembled work force was included in the income stream capitalized by the income approach used by the Board or if any value associated with the assembled work force was removed by the deduction of the base management fee of five percent. If the Board determined the work force was included in the purchase price, and it could quantitatively value that work force, and determine that it was subsumed in the income stream of the subject property, that value was to be removed from the income stream prior to capitalization.

(4) The Board was directed to take evidence from both parties to determine the value of an incentive management fee, and to remove such value from the income stream prior to capitalization. In so ruling, the court commented that at the administrative hearing the County had offered to deduct the value of the incentive management fee from the income stream prior to capitalization, but there was a dispute as to the value of the fee. The Assessor had attempted to introduce valuation evidence but Silverado's counsel objected "stating it was unfair to allow" the evidence because Silverado was not presenting "an intangibles case." However, the court was "perplexed" by Silverado's objection given that its current position was that it is the duty of the Assessor to identify, value, and remove intangible assets impermissibly subsumed in the income stream prior to capitalization. Thus the court found Silverado's objection to evidence of valuation of intangible assets that the Assessor agreed should be removed from the assessed value seemed to be inviting error by Silverado.

(5) The Board was permitted to consider the presence of intangible assets necessary to use the property as an assisted living and memory care facility so long as the value of such assets were not subsumed in the income stream to be capitalized using the income method.

Lastly, the trial court rejected Silverado's argument that it was entitled on remand to a new evidentiary hearing on all the evidence because one of the Board members, who had heard the evidence, had died. Instead, the court found that any "properly constituted" Board could adjudicate on remand "for the narrow purpose" of reconsidering the income approach to valuing the property, and, if necessary, the valuing and removal of intangibles from the assessment value.

The trial court entered an order and judgment consistent with its statement of decision. In pertinent part, the court directed that following the remand hearing, "the Board shall issue a new decision as to its determination of the value of the Subject Property. Nothing in this Order prevents the Board from exercising its discretion in a particular way. The Board shall remain subject to all legal requirements governing its proceedings. [¶] The Court's Statement of Decision provides further guidance for the

Board in conducting the hearings. The Court retains jurisdiction over this matter pending resolution of the Board's proceedings."

Silverado's timely appeal ensued. (See *De Luz Homes, Inc. v. County of San Diego* (1955) 45 Cal.2d 546, 553 [Supreme Court entertained appeal of order upholding assessor's methodology and remanding the matter to the Board for further proceedings with the trial court retaining jurisdiction to review the Board proceedings and make further orders].)

DISCUSSION

Silverado contends it is in the "anomalous position of appealing a substantially favorable, but flawed" order and judgment. It concedes the trial court awarded judgment in its favor, accepting Silverado's central premise that the Board had failed to make all necessary deductions to remove the value of intangible assets impermissibly subsumed in the assessment value, and that a remand was necessary for the Board to redetermine the value of only the taxable, tangible property. It complains, however, that the remand order and judgment is "materially deficient, unworkable, and unfair." We see no merit to Silverado's contentions.

"Using the income approach [to value real property], an appraiser 'estimates the future income stream a prospective purchaser could expect to receive from the enterprise and then discounts that amount to a present value by use of a capitalization rate.' " (*Elk Hills Power, supra*, 57 Cal.4th at p. 604, quoting *GTE Sprint Communications Corp. v. County of Alameda* (1994) 26 Cal.App.4th 992, 996 (*GTE Sprint*); see Cal. Code Regs., tit. 18, § 8.) "In other words, the fair market value of an income producing property is estimated as the present value of the property's expected future income stream. [Citation.] ' "The income approach may be called the capitalization method because capitalizing is the process of converting an income stream into a capital sum . . . ." ' [Citation.]" (*Elk Hills Power, supra*, at pp. 604–605.) Here, Silverado claimed that the Board improperly taxed intangible assets (such as the assembled workforce, the license to

operate the facility, the incentive management fee, and the business value) because it failed to attribute a portion of the facility's income stream (the operating income) to those intangible assets and deduct that value from the facility's projected income stream prior to taxation. (*Ibid*.)

Agreeing with Silverado's claim, in part, that when applying the income approach the Board had failed to make all necessary deductions for the values of intangible assets from the facility's projected income stream prior to taxation, the trial court remanded the matter to the Board to reconsider its valuation using the income method with specific directives regarding the evidence already in the record. The trial court also allowed that the Board, in its discretion, could reopen the hearing to permit both parties to submit additional evidence for the narrow purpose of assisting the Board in making a new determination of the fair market value of the subject property using the income approach method. In allowing for additional evidence, the trial court recognized that the Board's failure to make all necessary deductions to account for the intangible assets was an "invited error," caused, in significant part, by Silverado's objection that prohibited the admission of the Assessor's additional evidence of quantified values of the intangible assets that Silverado claimed had been impermissibly subsumed in the assessment value.

Addressing Silverado's complaint, we initially conclude and agree with the trial court that the Board acted well within its discretion and did not err as a matter of law in determining that the income approach was the best method to use to analyze the fair market value of the subject property. The tax code regulations specifically recognize the income approach as "the preferred approach for the appraisal of improved real properties . . . when," as in this case, "reliable sales data are not available and the cost approaches are unreliable because the reproducible property has suffered considered physical depreciation . . . ." (Cal. Code of Regs., tit. 18, § 8, subd. (a).) Moreover, the trial court properly found that the Board did not err by relying on the actual operating income generated by the facility on the subject property, rather than the comparable rental data

submitted by Silverado's expert appraiser. Contrary to Silverado's contentions, the courts have not rejected the Board's use of the income method to value real property by using a projected income stream generated by the facility on the subject property. The courts have merely required the Board to identify, value, and, then remove the values of any intangible assets that are subsumed in the projected income stream prior to taxation. (See, e.g., *DFS Group, L.P. v. County of San Mateo* (2019) 31 Cal.App.5th 1059, 1073, 1089, petn. for review pending, petn. filed Mar. 12, 2019 [where parties agreed the income capitalization method is appropriate valuation method, and it was appropriate to use the minimum annual guaranteed amount of rent to determine DFS's income from the property, the court remanded the matter to the Board for a reassessment hearing at which time the Board was to determine the value of an intangible concession right or to separate it from the value of the real property in interest]; *SHC Half Moon Bay, supra*, 226 Cal.App.4th at p. 493 [court remanded matter to the Board to recalculate the value of the real property applying the income method consistent with the court's view that the assessor had failed to identify, value, and remove the value of certain identified intangible assets and rights from the hotel's income stream prior to taxation]; *GTE Sprint, supra,* 26 Cal.App.4th at pp. 1003, 1005, 1008 [where the assessor's method of accounting for the value of intangible assets was found to be improper, and "the intangibles identified and valued by Sprint [had to be] excluded from assessment," the court remanded matter to the Board for a new reassessment hearing "at which time the Board's appraisers shall have an opportunity to present evidence rebutting Sprint's identification and/or valuation of intangible assets," and "both parties may present evidence as to the portion of the intangible values, if any, that can be deemed to enhance the value of the tangible property"].)

We are also not persuaded by Silverado's argument that the Assessor is or should be precluded, as a matter of constitutional and statutory law, from using an income approach that relies on the facility's actual operating income because that method by its

nature or "of necessity" will always subsume the value of intangible assets that are exempt from taxation. "[N]ot all intangible [assets] have a quantifiable fair market value that must be deducted" from the assessment value. (*Elk Hills Power*, *supra*, 57 Cal.4th at p. 617.) It is only because the "intangible assets" at issue here (the business enterprise, an assembled workforce, the management agreement/incentive management incentive fee, and a license to operate the facility) "make a direct contribution to the going concern value of the business as reflected in an income stream analysis," and for which there may be "a quantifiable fair market value," that a remand is necessary to allow the Board to value those intangible assets and deduct that value from the projected income stream prior to taxation. (*Id*. at pp. 618–619.)

We also see no basis for granting Silverado any relief based on its challenge to the trial court's rulings addressing the Board's rejection of Silverado's valuation evidence. Contrary to Silverado's contentions, the trial court properly found that there was substantial evidence supporting the Board's rejection of Silverado's valuation evidence on the sole ground that the "comparable" properties relied on by its expert appraiser were not sufficiently comparable to support valuing the property at $16 million. (See *Midstate Theatres Inc. v. County of Stanislaus* (1976) 55 Cal.App.3d 864, 880 [court deferred to the Board's determination of comparability of sales to the subject property for the purpose of determining valuation of the subject property].) Contrary to Silverado's argument, that fact that *Midstate Theatres* "is not an intangibles case," does not call into question the relevancy of the holding in that case and its applicability to this case.

Silverado's substantive challenge to the Board's rejection of the comparable properties evidence is similarly unavailing. It claims the Board "imposed excessive and unlawful 'comparability' requirements on Silverado in order to reject all of Silverado's credible comparable sales and lease evidence." However, there is no question but that the Board set forth in its findings of fact its reasons for rejecting Silverado's comparables

consistent with section 402.5.[2] We decline Silverado's request that we look at its trial court brief and reply brief in which it addressed in detail the flaws in the Board's findings. Our task as an appellate court is not to attempt to find support for Silverado's argument by independently examining the record. (*Wallace v. Thompson* (1954) 129 Cal.App.2d 21, 22.) In the absence of Silverado bearing its burden of presenting to this court error in the Board's findings, we apply the presumption that there is substantial evidence to sustain the questioned findings. (*Ibid*.)

Silverado also challenges the trial court's purported failure to fully address the Board's rejection of Silverado's valuation evidence on the ground that its expert appraiser failed to consider the inherent value of the possibility of further development of the subject property. However, we agree with the trial court that any error in the Board's reliance on that one factor in rejecting Silverado's valuation evidence was harmless. Given the Board's other and more significant reasons for rejecting the expert appraiser's evidence of comparable properties, we are confident that if we were to remand on this basis, the Board would reach the same determination and again reject the comparables evidence offered by Silverado's expert appraiser without reference to the inherent value of the possibility of further development of the subject property. Accordingly, we do not further address Silverado's contentions concerning this claim of error. Because the use of the income approach is not affected by the value of any inherent developability of the property in the event there is a change in the zoning limitations, we see no reason to

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[2] Section 402.5 reads: "When valuing property by comparison with sales of other properties, in order to be considered comparable, the sales shall be sufficiently near in time to the valuation date, and the properties sold shall be located sufficiently near the property being valued, and shall be sufficiently alike in respect to the character, size, situation, usability, zoning or other legal restriction as to use unless rebutted pursuant to Section 402.1, to make it clear that the properties sold and the properties being valued are comparable in value and that the cash equivalent price realized for the properties sold may fairly be considered as shedding light on the value of the property being valued. 'Near in time to the valuation date' does not include any sale more than 90 days after the valuation date."

direct the Board to presume that existing zoning limitations will remain in effect as Silverado requests.

We also see no merit to Silverado's argument that, while its expert appraiser did not present a "formal cost approach," there is evidence in the record that would support valuing the subject property using that method (evidence proffered by its expert appraiser as to the fee simple value of the subject property and undisputed evidence proffered by the Assessor as to the value of the improvements on the subject property), and therefore the Board should be allowed to consider such evidence on remand. Silverado's argument ignores the fact that the Board rejected its expert appraiser's estimate of the fee simple value of the land based on sales or offerings for sale of six vacant land properties, which ruling is supported by substantial evidence. Consequently, we see no reason to grant Silverado's request to expand the remand hearing to allow the Board to reconsider a cost approach to valuing the subject property.

Lastly, and in concluding our discussion, we emphatically agree with the trial court that the remand hearing is to be limited to a reassessment of the fair market value of the subject property using the income approach analysis based on the evidence presented at the administrative hearings. As noted, the Board has the option of using either the actual operating income of the facility on the subject property (the Assessor's method) or using comparable rents of other properties (the method used by Silverado's expert appraiser). If the Board determines to use the comparable rents of other properties, the Board, in its discretion, may allow Silverado to present additional evidence on the issue of comparable rents of other properties in support of its expert appraiser's analysis. If the Board again determines to use the actual operating income of the facility on the subject property in its income approach analysis, the Board may allow the Assessor to submit the evidence of quantified values of certain intangible assets that it had offered at the original hearings in support of its revised income approach analysis. If Silverado objects to the Assessor's revised income approach analysis, Silverado will have the burden of

producing credible evidence of the quantified values of any intangible assets that "it contends has been subsumed in the Assessor's valuation." (*Elk Hills Power*, *supra*, 57 Cal.4th at p. 615 ["if the intangible assets are necessary to the beneficial or productive use of the taxable property, the court must determine whether the [taxpayer] plaintiff has put forth credible evidence that the fair market value of those assets has been improperly subsumed in the valuation"].) In sum, we concur with the trial court's determination that at the remand hearing, the Board shall consider the evidence in the administrative record, and, may accept additional evidence from both parties limited to the Board's determination of valuation of the subject property based on an income approach analysis, and if necessary, to a determination of the identities and quantified values of any intangible assets that have been identified by Silverado at the previously held administrative hearings.[3]

DISPOSITION

The order and judgment are affirmed. Defendant County of San Mateo is awarded costs on appeal.

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[3] In light of our determination, we need not address Silverado's other contentions. The court's remand order and judgment directs that the remand hearing is to be held before a properly constituted Board. While this appeal was pending, Silverado filed a request for judicial notice, asking us to consider the fact that all of the Board members who heard the original appeal are no longer Board members. We deferred consideration of the request until this time. We now deny the request for judicial notice as moot as the Board's current composition is not material to our resolution of the appeal. (*Guerrero v. Pacific Gas & Electric Co.* (2014) 230 Cal.App.4th 567, 577 [court denied request for judicial notice where matters for which notice was sought were immaterial to resolution of the appeal].)

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Petrou, J.

WE CONCUR:

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Siggins, P.J.

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Wiseman, J.*

SSL Landlord, LLC v. County of San Mateo/150878

* Retired Associate Judge of the Court of Appeal, Fifth Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.